

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LUIS A.,

Claimant,

vs.

REGIONAL CENTER OF ORANGE
COUNTY,

Service Agency.

OAH No. L 2006050419

DECISION

Gary Brozio, Administrative Law Judge, Office of Administrative Hearings, heard this matter in Santa Ana, California, on October 20, 2006.

Mary Kavli, Program Manager, Fair Hearings & Mediations, represented the Regional Center of Orange County (RCOC).

Luis A. (claimant) was not present at the fair hearing. He was represented by his mother, Maria R., who was assisted by her friend, Veronica Gomez, and Certified Spanish Interpreter Eric Serrano, No. 301025.

The matter was submitted on October 20, 2006.

ISSUES

Does Luis have a developmental disability that qualifies him for regional center services under the Lanterman Act?

More specifically, does Luis have autism, or a condition closely related to mental retardation, or a condition requiring treatment similar to mental retardation?

If so, does Luis's condition constitute a substantial disability that is it likely to continue indefinitely?

FACTUAL FINDINGS

Background

1. Luis is nine years old and lives with his mother and younger brother in Garden Grove, California. He applied for services at RCOC in 2005.

2. In June 2005, RCOC conducted a Social Assessment, and in September 2005, Dr. Kyle Pontius¹ prepared a Psychologist's Evaluation of Eligibility for Services. Dr. Pontius reviewed relevant documents, interviewed Luis's mother, and observed Luis at RCOC. His report concluded that Luis did not have a developmental disability or a substantial handicap in three life areas. On September 28, 2005, an interdisciplinary eligibility team determined that Luis did not qualify for regional center services.

3. Luis's mother contested that determination, and RCOC agreed to reassess Luis's condition. For the reassessment, Dr. Pontius and Dr. Peter Himber² interviewed Luis's teacher and observed Luis at school. Afterward, Dr. Himber prepared a Physician's Report which concluded that Luis did not have a developmental disability or substantial handicap. On April 5, 2006, an eligibility team again determined that Luis did not qualify for regional center services.

4. Luis's mother requested a fair hearing.

Autism

5. The Lanterman Act includes autism as a developmental disability. (Welf. & Inst. Code, § 4512, subd. (a).) The criteria for a diagnosis of autism are contained in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). To be diagnosed as autistic, Section 299.00 of the DSM-IV-TR requires that the person have:

“A. A total of six (or more) items from [categories] (1), (2), and (3), with at least two from [category] (1), and one each from [categories] (2) and (3):

(1) Qualitative impairment in social interaction, as manifested by at least two of the following:

(a) Marked impairments in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction;

¹ Dr. Pontius is a psychologist with considerable experience in autism. He has assessed thousands of individuals for autism, and has made hundreds of diagnoses for that developmental disability.

² Dr. Himber is a pediatric neurologist with extensive training and experience in autism. He has examined over 2000 people with autism.

(b) failure to develop peer relationships appropriate to developmental level;

(c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest);

(d) lack of social or emotional reciprocity.

(2) Qualitative impairments in communication as manifested by at least one of the following:

(a) Delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime);

(b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others;

(c) stereotyped and repetitive use of language or idiosyncratic language;

(d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level.

(3) Restricted repetitive and stereotyped patterns of behavior, interests and activities, as manifested by at least two of the following:

(a) Encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus;

(b) apparently inflexible adherence to specific, nonfunctional routines or rituals;

(c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements);

(d) persistent preoccupation with parts of objects.

B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, (3) symbolic or imaginative play.

C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder.”

6. Dr. Pontius and Dr. Himber testified that Luis failed to meet the DSM-IV-TR's criteria for a diagnosis of autism. Luis met none of the criteria from category A(1) – social interaction. Luis made age-appropriate eye contact. At the social assessment, he wanted to play with his brother. At school, he made friends easily, shared, and took turns. He maintained appropriate space between himself and others. He plays with others rather than by himself. He approached and interacted appropriately with other children. He had several friends. He could be sympathetic to others.

7. Luis met only one of the criteria from category A(2) – communication. Luis had a significant delay in expressive language, and his syntax and grammar were partially delayed because his primary language was Spanish. He had a moderate to severe speech disorder, and he was receiving special education services for speech and language. The special education was directed at increasing Luis's tongue strength and lip mobility, which are not problems typically associated with autism. On the other hand, Luis could respond to his name, and he could express needs by “pointing, jargonizing, and verbalizing.” There was no evidence of echolalia or scripted speech.

8. Luis met one of the criteria from category A(3) – stereotyped behavior. Luis's mother stated that Luis obsessed over his favorite toy, which would meet one of the criteria from section A(3). On the other hand, Luis was very active and ran around non-stop. His gross and fine motor skills were good. He qualified for a regular physical education class in school. His mother also stated that he did hand flapping, but this behavior was not repetitive and did not meet the definition of a repetitive mannerism. There was no evidence of immutable routines.

9. Luis's special education teacher, who taught Luis for the past one-and-a-half years, told Dr. Himber that Luis did not exhibit any behaviors on the autistic spectrum.

10. In addition, Luis twice took the Childhood Autism Rating Scale, commonly referred to as the CARS test. The minimum score on the test is 15, and a score of 30 is necessary to be considered mildly autistic. Luis's first score was 21.5, and his second score was 18. Neither score indicated autism.

11. Accordingly, Luis cannot be diagnosed with autism under the DSM-IV-TR's criteria. The core problem in autism is significant deficits in social communication, which Luis does not have. Luis's core problem is the inability to inhibit impulses. He is demanding and acts without thinking. He is easily frustrated, hyperactive, and explosive. These traits suggest a possible diagnosis of Attention-Deficit /Hyperactivity Disorder but not autism.

Fifth Category

12. The Lanterman Act provides assistance to individuals with a condition “closely related to mental retardation” or who require “treatment similar to that required for individuals with mental retardation.” (Welf. & Inst. Code, § 4512, subd. (a).) This is commonly called the “fifth category.” “The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded.” (*Mason v. Office of Administrative Hearings* (2001) 89 CalApp.4th 1119, 1129.)

13. In 2002, the Association of Regional Center Agencies (ARCA) published standards for the purpose of making eligibility determinations under the fifth category. Although the ARCA standards have not been adopted by regulation, they provide a useful guideline.

14. Luis does not function similarly to a mentally retarded person because his general intelligence is too high. In February 2005, Luis took the Comprehensive Test of Nonverbal Intelligence (CTONI), a performance test used for children whose first language is not English. Luis’s I.Q. score was 91, which is in the average range. At the same time, he took the Woodcock-Johnson Tests of Achievement-III (WJ III), which measures how much a child has learned and how he or she uses the intelligence gained. Luis scored lower in reading and writing skills (with scores in the low average and upper borderline range), but he scored better in math (with scores in the average range). Thus, Luis’s score on the CTONI was well outside the range for mental retardation and fifth category eligibility, as were his WJ-III scores in math. His performance in reading and writing were suggestive of a speech and language disorder rather than global delays.

15. Luis does not require treatment similar to that required for mentally retarded people. He has intellectual capacities well beyond that of mentally retarded people. He does not need the kinds of services that are directed to people with significantly subaverage general intellectual functioning. (DSM-IV-TR at 41.)

Substantial Disability

16. Under the Lanterman Act, a developmental disability must constitute a “substantial disability,” requiring proof of at least three “significant functional limitations” in the areas of self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency. California Code of Regulations, title 17, section 54001, and the ARCA requirements repeat these requirements under the fifth category. The ARCA guidelines indicate that for children six to eighteen, the last category (economic self-sufficiency) is not applicable.

17. Luis has normal mobility. His CTONI and WJ-III scores demonstrated a lack of a substantial disability in learning. He has ample self-direction as demonstrated by his becoming a negative role model in school. Dr. Pontious determined that Luis was substantially disabled in language (for the reasons discussed in Factual Finding 7) and self-

care (because he was eight years old and was not fully toilet trained). This was based on Dr. Pontious' observations during the assessment at RCOC and discussions with Luis's mother. No expert rendered an opinion that Luis was substantially disabled in three or more areas. Thus, Luis's condition does not meet the definition of a substantial disability.

Duration

18. The Lanterman Act requires a developmental disability to be expected to continue "indefinitely." (Welf. & Inst. Code, § 4512, subd. (a).) Luis's teacher told Dr. Himber that Luis was showing marked improvement in social and language skills. This evidence suggested that Luis's condition might not continue indefinitely.

Claimant's Evidence

19. Most of the testimony regarding Luis's autistic behavior came from Veronica Gomez. Gomez is Luis's mother's friend. She has an autistic child, but she is not an expert in autism. Gomez believed that Luis was autistic because he did not interact when he did homework; he had low academic achievement; he hit himself in the head and failed to pay attention when spoken to; and he could not tell others about his emotions and reactions. Luis's mother added that Luis spread feces around the bathroom and the smell did not bother him.

20. Regarding substantial handicaps, Luis's mother's main complaint was that the social study was inaccurate. She testified that Luis could not purchase food by himself, and he could not tell the difference between a \$1 bill and a \$100 bill. He threw tantrums and hit and kicked his mother. He ran out the door when it was open. He needed his mother to put tooth paste on his tooth brush. He could not bathe himself, and he could not put his towel away after bathing. He needed to wear diapers and needed his mother to change them. He could not prepare food. He hid under chairs. Luis's mother said that her son's behavior was "not normal" and she could not understand why the regional center failed to see the "problem."

21. The mother's description of Luis's disabilities differed significantly from those of Luis's teacher and the regional-center professionals. The reason for the discrepancy was not clear. What was clear was that Luis did not act like an autistic child at school. This fact made it highly unlikely that Luis's misbehavior at home was because of autism.

22. Claimant submitted records showing that he had been diagnosed with "autistic spectrum disorder." A letter from a licensed clinical social worker, various single-page medical notes, and a two-and-a-half page report from pediatric neurologist Eduardo Gallegos were received. Dr. Gallegos's report was the only writing that offered sufficient detail to warrant consideration. The problem with Dr. Gallegos's report was that it was impossible assess the basis for the opinion. The report contained no record review, and it was unclear what symptoms of autism were observed personally. It was not clear how long he spent with Luis or whether he did any testing. Moreover, the DSM-IV-TR does not contain a diagnosis known as "autistic spectrum disorder," and so it was impossible to say whether Dr. Gallegos

rendered a diagnosis of autism under the criteria contained the DSM-IV-TR. Dr. Gallegos rendered no opinion on whether Luis's condition constituted a substantial disability or whether it was likely to continue indefinitely. In short, Dr. Gallegos's report was totally insufficient to establish that Luis requires regional-center services.

LEGAL CONCLUSIONS

The Lanterman Act

1. The Lanterman Developmental Disabilities Services Act (Act) is contained in the Welfare and Institutions Code. (Welf. & Inst. Code, § 4500 et. seq.) The purpose of the Act is to provide a "pattern of facilities and services . . . sufficiently complete to meet the needs of each person with *developmental disabilities*, regardless of age or degree of handicap, and at each stage of life." (§ 4501; *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388 (emphasis added).)

Developmental Disability

2. Section 4512, subdivision (a) of the Act defines a developmental disability as follows:

"(a) 'Developmental disability' means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a *substantial disability* for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature." (Emphasis added.)

3. Section 54000 of Title 17 of the California Code of Regulations further defines the term developmental disability:

"(a) 'Developmental Disability' means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

- (1) Originate before age eighteen;
- (2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.”

Substantial Disability

4. Section 4512, subdivision (l) of the Act defines a substantial disability as follows:

“(l) ‘Substantial disability’ means the existence of *significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:*

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.”

5. Section 54001 of Title 17 of the California Code of Regulations further defines the term substantial disability:

“(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.”

6. Section 54002 of Title 17 of the California Code of Regulations states that “‘Cognitive’ as used in this chapter means the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly and to profit from experience.”

Burden of Proof

7. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

The Evidence Was Not Sufficient to Establish That Luis is Eligible for Regional Center Services

8. Claimant failed to establish that he qualifies for regional center services under a diagnosis of autism or under the fifth category. Claimant failed to establish that he has a substantial disability in three areas or that his condition is likely to continue indefinitely. Claimant is not entitled to regional center services under the Lanterman Act. This conclusion is based on all the Factual Findings and Legal Conclusions.

ORDER

The RCOC’s denial of services under the Lanterman Act is upheld.

DATED: _____

GARY BROZIO
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.